No. 281

Supreme Court of the United States.

OCTOBER TERM, 1944.

SAMUEL SANDBERG ET AL.,
Petitioners,

v.

NEW ENGLAND NOVELTY CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS FOR THE COUNTY OF WORCESTER AND BRIEF IN SUPPORT THEREOF.

SIDNEY S. GRANT,
Attorney for the Petitioner.

SAMUEL E. ANGOFF,
HAROLD B. ROITMAN,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1944.

SAMUEL SANDBERG ET AL.,
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v.
NEW ENGLAND NOVELTY CO., INC.

PETITION FOR WRIT OF CERTIORARI.

Summary Statement of the Matter Involved.

This action arose on a petition for contempt of court brought in the Superior Court of the Commonwealth of Massachusetts for the County of Worcester by the respondents herein against the petitioners for violation of the terms of an injunction. The trial was held before a jury and a verdict was rendered in favor of the respondents herein. Some of the petitioners were given jail sentences, others were fined. Exceptions were taken by the petitioners and their bill of exceptions was heard by the Massachusetts Supreme Judicial Court, which overruled these exceptions. Mass. Advance Sheets (1944) 433. The principal questions involved in this bill of exceptions were the failure of the trial judge to grant the petitioners' motion for a directed verdict and motion to dismiss, the failure to instruct the jury properly regarding the constitutional rights of the petitioners under the Fourteenth

Amendment of the United States Constitution, and the failure to interpret properly the terms of the injunction in accordance with the constitutional rights of the petitioners. These questions were decided by the Massachusetts Supreme Judicial Court and materially affected its decision overruling the exceptions.

> *New England Novelty Co., Inc.*, v. *Samuel Sandberg et als.*, Mass. Advance Sheets (1944) 433, at 441, 443, appended to the Record.

The issue involved is whether a state court in a labor dispute involving peaceful picketing may restrict freedom of speech, press, and assembly by contempt proceedings under an injunctive decree.

The respondents herein brought a bill in equity seeking a restraining order against certain named members of a voluntary unincorporated trade union association. A preliminary injunction was issued by Donnelly, J., at the Superior Court in Worcester on October 22, 1941. This injunction is set out in full (Record, pp. 30-31). The pertinent provisions are as follows:

> "Said defendants and each of them are hereby enjoined and restrained from:
>
> "1. Maintaining over two pickets at any time at each of the entrances used by employees going to and from the premises of each of said companies onto the main highway, said entrances being as follows:
>
> "(a) joint entrance for employees of the New England Novelty Company and Commonwealth Plastic Company on Adams St. in said Leominster, at which entrance two pickets will be stationed; (b) joint entrances for employees of the New England Novelty Company and Commonwealth Plastic Company on Cotton St. in said Leominster, at which two pickets will

be stationed; (c) entrance for employees of New England Novelty Company on said Adams St. beyond Cotton St., at which two pickets will be stationed.

"2. Molesting, intimidating or threatening or preventing any person from going to and from the premises of said New England Novelty Company or Commonwealth Plastic Company.

"3. Congregating on either Adams St. or Cotton St. in said Leominster, or unlawfully congregating on any private property on said streets.

"4. Attempting to threaten, molest, intimidate, assault or injure any of the employees of either the New England Novelty Company or the Commonwealth Plastic Company, either at their homes or on any public street or thoroughfare or any other place.

"5. Attempting to interfere with in any manner whatsoever or preventing any person who is either now employed by said companies or who desires to enter the employ of said companies from doing so.

"6. There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and of free press."

The petitioners did not apply for a review of this injunction under G.L. (Ter. Ed.) c. 214, sec. 9A, since they relied upon paragraph 6 of the injunction to protect their constitutional rights.

Thereafter, on October 25, 1941, the respondents herein had each of the petitioners herein served with a petition for attachment for contempt (Record, pp. 31-34). This petition set forth the first five paragraphs of the preliminary injunction, but not the sixth, which was the paragraph expressly limiting the scope and effect of all prior paragraphs. In accordance with the provisions of the Massa-

chusetts General Laws (Ter. Ed.) c. 220, sec. 13A, the case was tried to a jury before Brogna, J.

The evidence showed that the scene of the picketing was a building housing two companies. One, the respondent herein, the New England Novelty Co., Inc., and the other, the Commonwealth Plastic Company. A strike was in progress against both of these companies. This building was surrounded by a wire fence containing two entrances. In accordance with the first provision of the injunction two pickets were stationed at each of these entrances.

On several occasions after the issuance of the preliminary injunction, a group of men, usually about twenty in number, would march back and forth two or three abreast along the streets, from a point some distance away from an entrance to a point near an entrance. The marchers always conducted themselves in a peaceful way without any violence (Record, pp. 20-23). Mass. Advance Sheets (1944) 433, 442.

The petitioner Samuel Sandberg had issued instructions to the pickets and assumed responsibility for what had been done. He had warned the marchers against violence and had warned them not to approach within fifteen feet of each gate. These instructions were issued after consultation with the Mayor and City Solicitor of Leominster, who shared his belief that such actions did not constitute a violation of the injunction (Record, pp. 11, 12).

The petitioners filed a motion for a directed verdict and a motion to dismiss (Record, p. 36) based on the rights guaranteed to them by the Fourteenth Amendment to the United States Constitution. These motions were denied.

The petitioners submitted seventeen requests for rulings (Record, pp. 37, 38) and excepted to the failure or refusal of the judge to grant these requests. Requests for rulings numbered 7 through 9 were specifically based on the petitioners' rights under the Fourteenth Amendment of the

United States Constitution. The petitioners also filed exceptions to the trial judge's charge to the jury, particularly to that portion of the charge defining peaceful picketing.

The petitioners' bill of exceptions to the Massachusetts Supreme Judicial Court was based on the judge's failure to grant these motions and these rulings and brought the constitutional issue directly before the Massachusetts Supreme Judicial Court. The Supreme Judicial Court of Massachusetts overruled these exceptions. Mass. Advance Sheets (1944) 433, appended to the Record herein.

Jurisdictional Statement.

It is contended that the United States Supreme Court has jurisdiction to review the matter here in question. The federal constitutional issues were properly raised by the petitioners' motion for a directed verdict, motion to dismiss and request for rulings. The decision of the Massachusetts Supreme Judicial Court shows that a federal issue was presented and decided. Mass. Advance Sheets (1944) 433, at 441 and 443. This is a final judgment by the highest court in the state.

Question Presented

The question presented to this court is whether the judgment for contempt under the injunction involved herein deprived the petitioners of their rights of free speech in violation of the constitutional guaranties under the Fourteenth Amendment of the United States Constitution.

This question presents the following issue:

Where peaceful picketing is carried on at the employer's place of business, may the pickets be punished for contempt

for violation of an injunction which sets forth as one of its terms that "there is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and free press"?

The following additional issues are also raised:

A. Can any injunction operate to prevent future peaceful picketing?

B. Is it a violation of the Federal Constitution to convict persons for contempt for violation of an injunction which is vague, uncertain and contradictory in its terms?

Reasons Relied upon for the Allowance of the Writ.

The substantial question which presents itself relates to the scope of state judicial censorship upon the rights of free speech, free assembly and free press guaranteed by the Federal Constitution; *i.e.*, whether the state courts, in interpreting their own injunctions, may establish standards prescribing and limiting the operation of federal guaranties of free speech, free press and assembly. It presents the issue as to whether the state courts may establish standards and enforce them by contempt procedure defining and limiting the operation of federal constitutional guaranties.

This case involves the question of whether certain persons doing peaceful acts in groups of moderate size can be found in contempt of the injunction set forth *supra*, p. 2, which specifically guarantees their federal rights by stating:

> "6. There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and of free press."

This court has previously stated that these constitutional rights are immune from either statutory or injunctive interference by the states.

Thornhill v. *Alabama*, 310 U.S. 88.
Carlson v. *California*, 310 U.S. 106.
American Federation of Labor v. *Swing*, 312 U.S. 321.
Hague v. *C.I.O.*, 307 U.S. 496.

Under the decision of the Massachusetts courts, these petitioners were caught in a dragnet of vague and indefinite boundaries which effectively curtailed their constitutional rights.

Carlson v. *California*, 310 U.S. 106.
Schneider v. *State*, 308 U.S. 147.

The issue is presented as to whether a state court in enforcing its contempt powers can apply different standards from those established by this court in interpreting these guaranties of freedom provided in the Federal Constitution.

Bridges v. *California*, 314 U.S. 252.

The injunction in this case could not be attacked directly on federal grounds since it specifically reserved these rights under section 6 of the preliminary injunction. Therefore the question is whether state courts can negate the effect of federal guaranties, as preserved and defined in recent cases by this court, by the indirect process of enforcing its contempt powers under vague standards contrary to those defined by this court. An analysis of this injunction as finally interpreted by the Massachusetts courts shows that it imposed material restrictions upon

freedom of speech. Previous decisions of this court have barred the use of such restrictions when the attempt was made to impose them by statutes, municipal ordinances and injunctions. A decision in this case should determine whether such power may be exercised by a state court indirectly through enforcement of its own injunction decree by the contempt process, especially where the injunction order is on its face couched in language which protects it from direct attack on constitutional grounds. This court anticipated the situation that has arisen in this case in *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, at 298, where it stated:

> "If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, . . . the doors of this Court are always open."

Therefore the petitioners respectfully petition this court for a writ of certiorari to the Superior Court of the State of Massachusetts for the County of Worcester.

Respectfully submitted,

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Attorney for the Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions Below.

The opinion of the Massachusetts Supreme Judicial Court is reported in 1944 Massachusetts Advance Sheets, 433. The opinion is appended to the Record.

II. Jurisdiction.

1. Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this court is invoked under Judicial Code, sec. 237(b), 28 U.S.C. 344(b), 43 Stat. 937.

2. Finality of Judgment.

The judgment forming the basis of this petition is final both in form and in substance and disposes of all elements of the controversy in the court below.

3. Timeliness.

The decree of the Massachusetts Supreme Judicial Court was entered on April 26, 1944. The petition for writ of certiorari is filed before the expiration of three months from that date.

III. Statement of the Case.

A summary statement of the case has been given in the petition for a writ of certiorari and is not repeated at this point.

IV. Specification of Errors.

The petitioners assign as error the holding of the Supreme Judicial Court of Massachusetts overruling the petitioners' exceptions to the following:

1. The failure of the trial judge to grant a motion to dismiss on the ground that the petitioners' actions were done in pursuance of the rights of free speech and of free press, guaranteed them by the due process clause of the Fourteenth Amendment of the United States Constitution (Record, p. 36).

2. The failure of the trial judge to grant a directed verdict (Record, p. 35), Massachusetts Advance Sheets (1944) 433, 443.

3. The failure of the trial judge to instruct the jury properly on the petitioners' constitutional rights as requested specifically in the petitioners' requests for rulings numbered 7, 8, and 9 (Record, pp. 37 and 38). Massachusetts Advance Sheets (1944) 433, 443.

4. The failure of the trial judge to instruct the jury properly regarding the petitioners' constitutional rights to peacefully picket (Record, pp. 27 and 28). Massachusetts Advance Sheets (1944) 433.

These holdings effectively denied to the petitioners their right to picket peacefully in accordance with the constitutional guaranty of free speech and the due process clause of the Fourteenth Amendment.

V. Argument.

A. Construction of the Injunction by the Massachusetts Courts by Preventing Peaceful Picketing Deprived the Petitioners of Their Rights under the Fourteenth Amendment.

The trial court adopted a narrow and erroneous construction of the right to picket peacefully and the Supreme

Judicial Court adopted this construction. The injunction does not come before this court as an isolated, self-contained writing, but as an order with the gloss of the Massachusetts courts on it.

> *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin Employment Relations Board*, 315 U.S. 437, 441.

Peaceful picketing has been established as a constitutional right in a series of cases by this court. This right was first noted in *Senn* v. *Tile Layers Protective Union*, 301 U.S. 468, and received further clarification in a series of cases including—

> *Thornhill* v. *Alabama*, 310 U.S. 88.
> *Carlson* v. *California*, 310 U.S. 106.
> *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.
> *American Federation of Labor* v. *Swing*, 312 U.S. 321.
> *Journeymen Tailors Union* v. *Miller's, Inc.*, 312 U.S. 658.
> *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769.
> *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293.

These cases establish the right of a union in a labor controversy to picket peacefully at the employers' place of business.

The injunction in this case must be construed with these decisions in mind. Therefore paragraph 6 of the preliminary injunction which states:

> "There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully

persuade or exercise their rights of free speech and of free press"—

must be taken to modify all of the other paragraphs of the injunction which would otherwise abridge or restrict this fundamental constitutional right.

Under the injunction including this paragraph 6, with the construction that must be placed upon it in accordance with the decisions of this court, the petitioners had no cause to seek a modification or a discharge of the injunction. The Union had no desire at any time to support the strike by any illegal means. Therefore it had no quarrel with the provisions of the injunction designed to prevent the physical blocking of the entrances or to prevent illegal intimidation and violence. Such acts were neither a part of the Union program nor sanctioned by it. The Union and its members merely wished to publicize their activities in the exercise of their constitutional right to picket peacefully. Therefore the statement of the Massachusetts Supreme Judicial Court that—

> "The defendants could have availed themselves of the speedy and effectual remedy provided by G.L. (Ter. Ed.) c. 214, §9A, inserted by St. 1935, c. 407, § 4, if they desired a modification or a discharge of the injunction" (Massachusetts Advance Sheets (1944) 433, 441)—

is not an answer to the petitioners' exceptions brought under this petition for contempt. It was unnecessary for the petitioners to seek a modification of the injunction, as the Supreme Judicial Court of Massachusetts suggests, since they had a right to assume that section 6 of the injunction meant what it said, and therefore their constitutional rights were guaranteed.

The construction placed upon the injunction by the Massachusetts courts ignored the rulings of this court that peaceful picketing was a right guaranteed by the Federal Constitution. Cases cited *supra*, p. 11. In adopting this construction, the Massachusetts court, through the use of its contempt powers, punished the petitioners for the exercise of rights established by the Constitution of the United States and sanctioned under the terms of the injunction itself.

The Massachusetts courts interpreted the terms of the injunction in violation of the Fourteenth Amendment in the following manner:

1. The court defined picketing to include a person who goes to the place of the employer for the purpose of watching and obtaining information (Record, p. 18), and then went on to say that any person who was close enough to the fence to perform such picket duty violated the restraining order. Since anyone within eyeshot of the fence or gate would come within this definition, regardless of how peaceful his conduct might otherwise be, this construction deprived him of his constitutional rights.

2. The court instructed the jury that it could find molestation, intimidation and threats in violation of the injunction from the mere presence of peaceful pickets, regardless of the fact that there was no evidence that anyone was disturbed, intimidated or threatened (Record, pp. 20 and 21). This construction obviously prevented any peaceful picketing.

3. The court instructed the jury that the mere gathering together in groups was a violation of section 3 of the injunction (Record, p. 21). This interpretation effectively ignored the ruling of this court in *Hague* v. *C.I.O.*, 307 U.S. 496. Without any evidence that the streets were blocked or that the public was inconvenienced, the petitioners were deprived of their right to peaceful assembly.

4. The court further instructed the jury that it could find intimidation in violation of the injunction from the numbers of pickets involved (Record, p. 23). The evidence disclosed that the highest number of pickets that appeared at any one time was between twenty and thirty. A group limited to this size does not raise any question of mass picketing. Cf. *Carlson* v. *California*, 310 U.S. 106, where there were twenty-nine pickets involved. These rulings, which were sustained by the Massachusetts Supreme Judicial Court, deprived the petitioners of their constitutional rights by disregarding the rules and precedents laid down by this court. A proper construction and interpretation of the injunction would have required the court to interpret the provisions of the injunction as strictly as possible to bring them within the rights guaranteed by the Fourteenth Amendment.

The failure of the trial judge to grant the petitioners' motion for a directed verdict, motion to dismiss and request for rulings, and his improper charge defining peaceful picketing, raise the question of the petitioners' rights to picket peacefully under the Fourteenth Amendment. The sustaining of these rulings by the Massachusetts Supreme Judicial Court established the fact that the state court is defining the scope of the Fourteenth Amendment in terms at variance with those laid down by this court. The Massachusetts Supreme Judicial Court apparently has seen fit to vary with this court's interpretation in labor cases.

> Cf. *Fashioncraft, Inc.*, v. *Halpern*, 313 Mass. 385.

The Massachusetts court adopted its own notion of the Federal Constitution in ignoring the specific limitation in

paragraph 6 of the injunction itself. It gave the broadest possible interpretation to the language of the first five sections of the injunction making its prohibitions as wide as possible without regard to the constitutional guaranty. In so doing the court deprived the petitioners of their right to due process and their constitutional liberties guaranteed by the Fourteenth Amendment.

As this court stated:

> ". . . The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."
>
> *American Federation of Labor* v. *Swing*, 312 U.S. 321.

B. The Petitioners were Deprived of Their Constitutional Rights by a Conviction for Contempt of an Injunction Based on Insubstantial Findings of Fact.

The question of whether the petitioners violated the terms of the injunction (Massachusetts Advance Sheets (1944) 433, 441) brings up the issue of whether the evidence shows the petitioners violated any of the specific mandates of the injunction. This court has stated:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality."
>
> *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293.

The petitioners contend that a review of the evidence in this case will disclose that the conviction does rest upon such insubstantial findings of fact.

The facts brought out in the testimony show that there was no evidence that anyone was threatened, molested, intimidated or disturbed (Judge's Charge, Record, p. 20). It was further established that there was no evidence and no intimation of the use of any force or violence (Record, p. 23; Opinion, p. 442), nor was there any evidence from which the jury could find that there was an attempt to assault anyone or an attempt to injure anyone in his person or property (Record, p. 22). Therefore, the narrow question is whether peaceful picketing as conducted by the petitioners is a violation of the injunction. This brings up the direct constitutional issue of the scope of the Fourteenth Amendment as it defines the petitioners' right to peaceful picketing.

The trial judge in summing up the evidence to the jury pointed out that there was no evidence of any intimidation, disturbance or molesting (Record, pp. 20, 22, 23). Massachusetts Advance Sheets (1944) 433, 442. Therefore there was no violation of paragraphs 2, 4, and 5 of the injunction. Even if the record showed some isolated incidents of abuse, which it does not, it still would not justify the forfeiture of the petitioners' right to free speech. This point was made clear in *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, 296, where this court stated:

> "Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."

The respondents in open court waived any question of congregating on any private way or private property (Rec-

ord, p. 21), so there was no violation of section 3 of the injunction unless the use of the streets is denied to the petitioners in spite of the clear rulings of this court.

Lovell v. *Griffin*, 303 U.S. 444.
Hague v *C.I.O.*, 307 U.S. 496.
Schneider v. *State*, 308 U.S. 147.
Cantwell v. *Connecticut*, 310 U.S. 296.

This leaves only section 1 of the injunction for further consideration. The record discloses that only two pickets were stationed at the entrances set forth in the injunction, so there was no violation of this clause of the injunction.

The conviction of the petitioners under this indefinite, uncertain evidence deprived them of their constitutional right to due process. In *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, this court pointed out that it had the duty to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Even the most casual consideration of section 6 of the injunction in the light of the foregoing facts makes more conclusive the petitioners' claim that their conviction requires review by this court.

C. The Imposition of Criminal Penalties under the Vague and Ambiguous Terms of the Injunction Violated the Petitioners' Constitutional Rights.

This injunction effectively prevented freedom of speech, freedom of assembly and the right to picket peacefully in its first five sections, but at the same time permitted these activities under section 6.

This petition was tried on the theory that it charged the defendants, petitioners herein, with criminal contempt.

Massachusetts Advance Sheets (1944) 433, 437. The petitioners were given a jury trial on this theory and subjected to severe criminal penalties, including jail sentence. Therefore it must be considered as a criminal action subject to the constitutional requirements of due process for such cases. In this instance the criminal penalties which were imposed under the vague and uncertain mandates of this injunction were repugnant to the constitutional principle requiring a clear and explicit definition of the crime charged.

> *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81.

The ambiguity of the injunction as subsequently interpreted made it impossible for the petitioners to foresee the limits of conduct which would subject them to the criminal penalties imposed. Their calculations based upon the rulings of this court were completely offset by the interpretation placed on the injunction by the Massachusetts courts, which effectively subjected them to an *ex post facto* penalty.

This judgment was based on a common-law concept of a most general and undefined nature.

> *Cantwell* v. *Connecticut*, 310 U.S. at 308.
> *Bridges* v. *California*, 314 U.S. 252.

The liberties guaranteed by the Constitution were intended to be given the broadest scope that can be countenanced in an orderly society. *Bridges* v. *California, supra.* The construction placed upon these liberties guaranteed by the Massachusetts courts was narrow and restricted. There was never any showing of any danger to society or to the respondents in this case which would bring it within

the "clear and present danger test" enunciated by this court.

> *Schenck* v. *United States*, 249 U.S. 47, 52.
> *Thornhill* v. *Alabama*, 310 U.S. 88, 105.
> *Cantwell* v. *Connecticut*, 310 U.S. 296, 311.

On the contrary, the vital freedoms guaranteed by the Constitution were wiped out by the action of the Massachusetts courts.

D. The Provisions of an Injunction Cannot be Used as the Basis for Subsequent Contempt Proceedings to Punish Later Lawful Acts.

Any of the provisions of this injunction which barred future peaceful and lawful activities are void and cannot operate to sustain a conviction of the petitioners. In *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, this court, by a five-to-four decision, ruled that aggravated acts of violence warranted the issuance of an injunction. Nevertheless, the majority opinion did not make clear for how long an injunction so issued would continue in effect and whether or not all future activities, even though lawful, would be barred. It is to be noted that Mr. Justice Reed recognized this problem in his opinion, at p. 318, when he posed the following question:

> "Is the right to picket peacefully an employer's place of business lost for any period of future time by past acts of violence?"

In this case it is reasonable to assume that the injunction was not issued under the *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, doctrine, since the reservation of con-

stitutional rights in section 6 of the injunction would be inconsistent with past acts of violence of the kind and nature on which the injunction in the *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.* case was based. However, even if it may be assumed that the injunction was based on this doctrine, the question of its future operation still remains to be decided.

A state has adequate means at its disposal for maintaining law and order, so that short of some clear and present danger there is no justification for depriving, by the use of the injunction, individuals from exercising in the future those constitutional liberties which are the very backbone of our way of life.

VI. Conclusion.

Therefore the petitioners submit that this court should consider this case by issuing a writ of certiorari to the Superior Court of the State of Massachusetts for the County of Worcester.

Respectfully submitted,

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NEW ENGLAND NOVELTY CO., INC.,
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

In addition to the facts set forth in the petition for writ of certiorari and the opinion of the Supreme Judicial Court of Massachusetts, incorporated in the transcript of record accompanying said petition, the Court's attention is directed to the following additional facts: The preliminary injunction was issued on October 22, 1941 (Record, page 31), and the petition for contempt was filed on October 24, 1941 (Record, page 34). The defendants in the original proceeding (petitioners herein) did not object to the interlocutory decree ordering this preliminary injunction (Record, page 29, Memorandum). The marching back

and forth by the groups occurred every day only at about the times that the shift of employees was changing; employees and persons going to and from the plant had to pass by the gate at which this marching took place (Record, page 7). The marching took place in military fashion in groups of two or three, one behind the other, the group consisting of twenty-five or thirty men, the group walking the entire length of the fence, and actually walking by the entrance and back again (Record, page 9). This marching and congregating took place on Adams Street and Cotton Street, the streets mentioned in the injunction (Record, page 30, paragraph 3). The marchers were visible to employees working inside the plant (Record, page 6). The groups of strikers and the pickets congregated in the streets, and refused to move from Adams Street and Cotton Street when requested to do so by the police (Record, pages 10 and 11).

Statutory Provisions.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 220, SECTION 13A (ACTS OF 1935, CHAPTER 407, SECTION 5).

"Any person who shall wilfully disobey any lawful writ, process, order, decree or command of the court in any suit in which injunctive relief is sought in any matter involving or growing out of a labor dispute, as defined in section twenty C of chapter one hundred and forty-nine, by doing any act or thing in or by such writ, process, order, decree or command forbidden to be done by him, if the act or thing so done by him is of such character as to constitute also a criminal offence under the laws of the commonwealth shall enjoy the right to a speedy and public trial for his said contempt by an impartial jury of the county wherein it shall have been committed; provided, that this

right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or apply to the misbehavior, misconduct or disobedience of any officer of the court in respect to the writs, orders or process of the court."

MASSACHUSETTS GENERAL LAWS (TER. ED.), CHAPTER 214, SECTION 9A (ACTS OF 1935, CHAPTER 407, SECTION 4).

"(6) Whenever the court shall issue or deny a preliminary injunction in a case involving or growing out of a labor dispute, the court, upon the request of any party to the proceeding, shall forthwith report any questions of law involved in such issue or denial to the supreme judicial court and stay further proceedings except those necessary to preserve the rights of the parties. Upon the filing of such report, the questions reported shall be heard in a summary manner by a justice of the supreme judicial court, who shall with the greatest possible expedition affirm, reverse or modify the order of the superior court. The decision of such justice of the supreme judicial court upon the questions so raised shall be final, but without prejudice to the raising of the same questions before the full court upon exceptions, appeal or report after a final decree in the case."

Jurisdictional Statement.

The respondent does not question the jurisdiction of the United States Supreme Court to review the matters here in question.

Issues Presented.

The issues presented by the petition for the writ of certiorari are:

I. Did the petitioners' conduct come within the protection of the right of free speech and free press guaranteed by the Fourteenth Amendment of the United States Constitution?

II. Did the trial judge commit reversible error in refusing to grant petitioners' motion for a directed verdict, and to instruct the jury in accordance with petitioners' request?

III. The convictions for contempt were not based on insubstantial or inadequate findings of fact.

IV. The preliminary injunction was not vague or ambiguous.

V. The imposition of criminal penalties does not make this a criminal proceeding.

VI. The preliminary injunction was in full force and effect at the time of the acts which were the basis of the contempt adjudication.

Argument.

I. The petitioners have not been deprived of their rights under the Fourteenth Amendment.

In approaching this issue it should be clearly borne in mind that the question before the Court does not relate to the propriety of the issuance of the injunction, but rather to the interpretation of its language, and whether the petitioners have violated its terms. In this contempt proceeding, as in all contempt proceedings, as is pointed out in the opinion of the Supreme Judicial Court (1944 Adv. Sh. 433, 441), the sole issue presented is whether the peti-

tioners (defendants) have violated its terms. While the injunction remained in force the petitioners (defendants) were required to obey its terms.

Howat v. *Kansas*, 258 U.S. 181.
Bonifazi v. *Breschi*, 296 Mass. 544, 547.
New York Central Railroad Co. v. *Ayer*, 253 Mass. 122.
Irving & Casson v. *Howlett*, 229 Mass. 560, at 562, 563.
Jennings v. *United States*, 264 Fed. 399.

In this connection the attention of the Court is directed to the principle that is established in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, where this Court overruled the principle of *Swift* v. *Tyson*, 16 Pet. 1, and established the principle that the law of the State governs in a situation such as this (the status of an injunction) and that this Court is bound by the interpretation of the State Court. See *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487. There is no constitutional question involved in the Massachusetts Court's ruling as to the status of this injunction in contempt proceedings. It is consistent with the holding of this Court in *Howat* v. *Kansas*, 258 U.S. 181. The same principle has been applied by this Court in *Prince* v. *Massachusetts*, 321 U.S. 158, where the Court, speaking through Rutledge, J., pointed out that the decision of the Massachusetts Supreme Judicial Court on the interpretation of the language of a statute was binding on the United States Supreme Court, even though the Massachusetts decision was contrary to the trend of decisions in other States.

The case, therefore, must proceed on the basis that the facts set forth in the original bill of complaint, which sought the injunction, were sufficient to justify the issu-

ance of the injunction and in limiting and defining the petitioners' future conduct in connection with this labor controversy. In *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, this Court held that the Courts of the State of Illinois did not violate any constitutional guaranty of freedom of speech in enjoining all picketing in a setting of disorder and continuing intimidation. It held that the Fourteenth Amendment did not bar a State Court from granting injunctive relief in a proper case. In this case Mr. Justice Frankfurter uses the following pertinent language (pp. 292-296):

> ". . . The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.
>
> . . . . . .
>
> ". . . To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from

being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436.

. . . . . .

". . . The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts.

. . . . . .

". . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

"We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of

violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. . . . But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See *Fox River Co.* v. *Railroad Comm'n,* 274 U.S. 651, 655; *Long Sault Development Co.* v. *Call,* 242 U.S. 272, 277. We are here concerned with power and not with the wisdom of its exercise."

The opinion then goes on to say that there is nothing in it which qualified *Thornhill* v. *Alabama,* 310 U.S. 88, 105, and other similar cases, pointing out that in those cases the Court had before it statutes baldly forbidding all picketing without any aspect of violence being involved, which amounted to an unlimited ban on free communication. It pointed out that even in the *Thornhill* case the Court stated that a statute could be so narrowly drawn as to cover situations of imminent or aggravated danger, and that, if a statute could do so, so the law of a State may be fitted to a concrete situation through the authority given by the State to its Court. The opinion closes with this language (p. 299):

"A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for

> legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution."

In the dissenting opinion of Mr. Justice Reed in the same case, the Court's right to limit the number of pickets is recognized in the following language (pp. 318-319):

> "Where nothing further appears, it is agreed that peaceful picketing, since it is an exercise of freedom of speech, may not be prohibited by injunction or by statute. *Thornhill* v. *Alabama,* 310 U.S. 88; *American Federation of Labor* v. *Swing* [312 U.S. 321]. It is equally clear that the right to picket is not absolute. It may, if actually necessary, be limited, let us say, to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation. *Thornhill* v. *Alabama, supra,* 105. From the standpoint of the state, industrial controversy may not overstep the bounds of an appeal to reason and sympathy."

There is nothing in the decision of this Court in *Cafeteria Employees Union* v. *Angelos,* 320 U.S. 293, which limits the decision in the *Meadowmoor* case. The latter opinion merely holds that on the facts in that case the picketing was peaceful and unaccompanied by falsehoods, and therefore was not subject to Court injunction; in other

words, that the facts did not support the issuance of an injunction. For reasons pointed out earlier in this brief, it must be conclusively assumed that the facts justified the issuance of the preliminary injunction. The petitioners (Brief, page 20) criticise the fact that the injunctive arm of the Court was used for the purpose of maintaining law and order and preventing future wrongful and improper conduct. It is their position that other adequate means available to the State should have been used. It is submitted that this reasoning is fallacious. The petitioners would deny to the Courts of the Commonwealth of Massachusetts the very right which this Court in *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, held that the Courts of a State had.

II. THE TRIAL JUDGE DID NOT COMMIT ERROR IN REFUSING TO GRANT PETITIONERS' MOTIONS FOR A DIRECTED VERDICT AND THEIR SEVERAL REQUESTS FOR RULINGS.

Applying the principle of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, and *Prince* v. *Massachusetts*, 321 U.S. 158, it must follow that the State Court's construction of the language of this injunction and its disposition of the exceptions relating to the denial of the motions for a directed verdict and the several requests for rulings are binding and conclusive on this Court.

III. THE CONVICTIONS FOR CONTEMPT WERE NOT BASED ON INSUBSTANTIAL OR INADEQUATE FINDINGS OF FACT.

Clearly there were sufficient facts, as set forth in the Transcript of the Record and as summarized in the opinion of the Massachusetts Supreme Judicial Court, to justify jury findings that the terms of the preliminary in-

junction had been violated. These were not isolated, disconnected incidents, but were clearly and unmistakably an interrelated course of conduct carried on under the direction and the instructions of the Union leaders, designed by force of numbers to intimidate and coerce those who desired to work, in violation of their constitutional right to a reasonable opportunity to go to and from their work without molestation, interference or intimidation. The large groups that collected at the entrances when shifts were changing were to demonstrate the power and strength of the strikers to the employees of the plaintiff and to instill in them fear and apprehension. This deliberate course of conduct was a clear violation of the language, purpose and intent of the preliminary injunction.

IV. The preliminary injunction was not vague or ambiguous.

The language of the injunction as defined by the trial judge and the Supreme Judicial Court was clear and definite, and the fact that these petitioners sought by their conduct to give such language a strained, uncalled for and distorted interpretation does not serve to make clear and explicit language vague and indefinite. See *New England Novelty Co., Inc.,* v. *Sandberg,* 1944 Adv. Sh. 433, at 441, 443. Paragraph 6 of the injunction, which is relied on by the petitioners, does not make this injunction vague or indefinite. In this connection the Massachusetts Court has held, citing the case of *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468, that the term "peaceful picketing," "implies not only absence of violence but absence of any unlawful act." *R. H. White Co.* v. *Murphy,* 310 Mass. 510, 520. Peaceful picketing and peaceful persuasion, as defined by the trial Court (Record, page 23), must be free of

acts of molestation, intimidation, force and violence, and must be done in such a way that ordinary persons could go to and from work, and would not be intimidated by acts, words or conduct of the strikers.

The recent decisions of this Court in—

Carlson v. *California,* 310 U.S. 106;
Thornhill v. *Alabama,* 310 U.S. 88;
Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287; and
American Federation of Labor v. *Swing,* 312 U.S. 321—

on the question of free speech and free press, have held that picketing, *en masse* or otherwise, conducted so as to occasion "imminent and aggravated danger," was not within the scope of the constitutional protection of free speech.

In *Great Northern Railway Co.* v. *United States,* 208 U.S. 452, this Court held that an objection to the sufficiency of an indictment will not be considered on certiorari where it has not been raised in the Courts below. If the petitioners desired to raise this question, they could have done so by filing a motion to dismiss or demurrer in the Court below.

The provision of paragraph 6 of the preliminary injunction does not make the injunction vague or ambiguous. This provision merely reaffirms the inherent constitutional right afforded to all citizenry. This constitutional right can be legally exercised only in such manner as to come within the interpretation placed upon it by the Courts, and does not protect conduct which is violative of a Court decree, or goes beyond the bounds of peaceful picketing as defined by the Court.

V. The fact that criminal penalties were imposed does not make this a criminal proceeding.

As is pointed out in the opinion of the Supreme Judicial Court, the petitioners' right to a trial by jury is based on the provisions of G.L. (Ter. Ed.) c. 220, sec. 13A (see Statutory Provisions, this Brief, page 2), which establishes certain procedure in equity actions arising out of labor controversies, including a provision for trial by jury, if the alleged wrongful act is of such character as also to constitute a criminal offense under the laws of the Commonwealth. As is pointed out in the opinion of the Supreme Judicial Court, the fact that criminal penalties were imposed upon the defendants does not make that which otherwise would be a civil remedial proceeding a punitive one. Nor does the fact that the conduct which constitutes violation also constitutes a criminal offense change the nature of an otherwise remedial civil proceeding for contempt. Nor does the change in procedure have the effect of making what would otherwise be a civil remedial contempt into a punitive one. As to this issue it is also submitted that the principles applied by the Massachusetts Court, and its interpretation of the nature of the contempt proceeding, are binding upon this Court.

The case of *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, relied on by the petitioners, does not aid them. It was a criminal proceeding and the Court held that a statute creating a crime and imposing criminal penalties, which failed to forbid any specific or definite act and punished all acts detrimental to the public interest when unjust and unreasonable in the opinion of the Court and jury, was vague and indefinite and an unconstitutional delegation of legislative power by Congress to a Court and jury. It is pointed out that it is distinguishable from a group of cases, which it cites, where the statute was held

to be valid because the statute did set a standard. This injunction set a clear, definite standard.

VI. THE PRELIMINARY INJUNCTION WAS IN FULL FORCE AND EFFECT AT THE TIME THAT THE ACTS WHICH WERE THE BASIS OF THE CONTEMPT ADJUDICATION OCCURRED.

The injunction was issued on October 22, 1941 (Record, page 31). The petition for contempt was filed and an order of notice was issued thereon on October 24, 1941 (Record, page 34). The evidence that was the basis of the conviction related to the conduct of the petitioners between these two dates (October 22d to October 24th). Clearly an injunction, to have any effect at all as to future conduct arising out of the same labor controversy in which the injunction was issued, must be held to continue in full force and effect at least for the duration of the current labor controversy.

Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

United States v. *Railway Employees' Department, American Federation of Labor*, 283 Fed. 479.

Nann v. *Raimist*, 255 N.Y. 307.

If the petitioners wanted the injunction modified or vacated, they had ample remedy, by applying to the Court under G.L. (Ter. Ed.) c. 214, sec. 9A, as is pointed out in the Supreme Judicial Court opinion, at page 441.

Conclusion.

Although this Court has jurisdiction, it should nevertheless refuse to exercise it, it being a discretionary rather than an obligatory one, because (1) the questions sought to be raised are not novel, and have been recently decided by this Court adversely to petitioners' claims, and therefore do not require restatement of the principles involved; (2) the petitioners did not object to the issuance of the preliminary injunction in its present form; (3) the petitioners failed to avail themselves of the speedy and effectual remedy provided by G.L. (Ter. Ed.) c. 214, sec. 9A, for a modification, clarification or interpretation of the injunction.

Respectfully submitted,

SAMUEL M. SALNY,

Attorney for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 281.

SAMUEL SANDBERG ET AL.,
Petitioners,

v.

NEW ENGLAND NOVELTY CO., INC.

PETITION FOR REHEARING.

SIDNEY S. GRANT,
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SAMUEL E. ANGOFF,
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Supreme Court of the United States.

OCTOBER TERM, 1944.

SAMUEL SANDBERG ET AL., *Petitioners,*

v.

NEW ENGLAND NOVELTY CO., INC.

PETITION FOR REHEARING.

This petition is brought because of the question of public interest in protecting the right of freedom of speech in the Commonwealth of Massachusetts. The original petition for certiorari was confined to the aspects of this case which were limited to the defendants. The jurisdictional facts in the case were set forth fully therein. However, it should be pointed out that this case is but one of a number which have arisen in Massachusetts on the vital question of peaceful picketing as an exercise of freedom of speech under the Federal Constitution.

Citizens of Massachusetts, including the petitioners, have been subjected to an ever narrowing interpretation of this right by the Massachusetts Courts at the same time that this Court, in a series of decisions, was widening and strengthening the principle that peaceful picketing is an aspect of the freedom of speech guarantee in the First and Fourteenth Amendments of the United States Constitution. The exercise of this right in Massachusetts has been constricted by a series of cases which preceded the decision in

this case, but which, for reasons beyond the control of the present petitioners, were never brought before this Court for consideration and review.

These cases materially affected the decision in the present case. They have formed a pattern of law in Massachusetts which is at variance with the decisions of this Court and which requires review not only in behalf of these petitioners, but also for the protection of the people within the Commonwealth in their future exercise of the right to peacefully picket.

This Court first noted the right of peaceful picketing as an exercise of the constitutional right to free speech in *Senn* v. *The Tile Layers' Protective Union*, 301 U.S. 468, and further clarified and strengthened this principle in a series of cases including the following:

American Federation of Labor v. *Swing*, 312 U.S. 321.

Bakery & Pastry Drivers' Local v. *Wohl*, 315 U.S. 769.

Cafeteria Employees Union v. *Angelos*, 320 U.S. 293.

Carlson v. *California*, 310 U.S. 106.

Journeymen Tailors' Union v. *Miller's Inc.*, 312 U.S. 658.

Thornhill v. *Alabama*, 310 U.S. 88.

Peaceful picketing as a component part of the right of free speech is guaranteed under the Constitution by these cases. It may only be limited or abridged when there is a "clear and present danger to the State." *Schenck* v. *United States*, 249 U.S. 47.

The principle of free speech is guaranteed by the Federal Government under the First and Fourteenth Amendments, and a state is forbidden to deprive anyone of this right by

statute, order or court decree. The principle of *Erie Railway* v. *Tompkins*, 304 U.S. 64, has no application here where it is the duty of the Federal Government to protect all the people in their exercise of these rights from encroachment by any source.

The Courts of the Commonwealth of Massachusetts have attempted, however, to ignore the effect of this Federal doctrine by establishing their own limitations under which the right of peaceful picketing may be exercised. The Massachusetts Supreme Judicial Court has decided that it may limit the right to freedom of speech to those instances where, in its own judgment, the right to peacefully picket was exercised in a cause and manner which it considered wise, just or legal without regard to the clear and present danger test, which this Court has stated is the only limitation to these rights.

The cases which the Massachusetts Supreme Judicial Court have decided subsequent to the *Senn* v. *Tile Layers* case on the question of peaceful picketing illustrated the extent to which this right has been limited and circumscribed in this Commonwealth. *Simon* v. *Schwachman*, 301 Mass. 573, decided December 15, 1938, ruled that peaceful picketing by one picket who walked in front of the plaintiff's shop saying:

> "Do not patronize this store"
> "Do not cross the picket line"
> "This store is unfair to organized labor"—

was unlawful and enjoinable because it stated that the purpose of the speech was to secure the employment of union members and the ultimate establishment of a closed shop.

Quinton's Market, Inc., v. *Patterson*, 303 Mass. 315, decided June 5, 1939, sustained an award of damages and an

interlocutory injunction imposed against members of a labor union who were attempting to establish a local custom of half holidays on Wednesdays for retail markets in the summer months. About twenty members of the union, which had secured this benefit for its members in other stores, picketed the plaintiff's store. The Massachusetts Court prevented them from speaking freely on this subject because they felt that they were not proper persons to make such speeches and because they felt the subject-matter was not an appropriate one for members of the union to discuss.

Fashioncraft, Inc., v. *Halpern*, 313 Mass. 385, decided March 29, 1943, involved the peaceful picketing of the plaintiff's factory. One of the aims of this peaceful picketing was to secure a closed shop. Although the contention that peaceful picketing was an exercise of the right to free speech under the United States Constitution was specifically raised, the Massachusetts Supreme Judicial Court decreed that the state was not required to tolerate such picketing unless it found that such picketing was for the accomplishment of a lawful purpose and done by lawful means. Since the Court did not consider the attempt by the employees and the union to obtain a closed shop to be a lawful objective, it enjoined the workers from exercising the right to peacefully picket the plaintiff's factory.

These cases establish the pattern that the Massachusetts Court would uphold the validity of an injunction against peaceful picketing and that it did not consider that the guarantee of freedom of speech in the First and Fourteenth Amendments of the United States Constitution required it to modify the prerogative which it had assumed of determining when, where and for what objective it would allow workers to exercise this right within the confines of the State of Massachusetts.

It is with this background that the present case arose. The previous cases indicated that an appeal on the injunction would not only be a time-consuming process, but one promising little or no results. The petitioners were involved in a strike. The issue was crucial to them. Unless they could exercise the right of freedom of speech by using the method of peaceful picketing during the progress of the strike where the issue was being decided, their theoretical right of freedom of speech was only of academic interest. The decisions of this Court in cases previously cited led them to believe that, so long as their conduct was peaceful, they were within their constitutional rights. When the injunction was issued, there was nothing in its language to lead them to presume otherwise and, in fact, the local civic authorities concurred in this view. Record, pp. 11, 12.

The injunction issued against the defendants in this case expressly reserved to them their constitutional rights of free speech and free press. This reservation contained in paragraph 6 of the injunction states:

> "There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and of free press."

The inclusion of Paragraph 6 indicated that the injunction was not based on the doctrine of *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, since under that doctrine the reservation would have been unnecessary.

What was apparently indicated was that the defendants could continue to peacefully picket under their rights of free speech and free press as defined by this Court. But when the judge's charge to the jury that peaceful picketing could in and of itself be considered coercive because of the mere presence of the pickets was upheld by the Supreme

Judicial Court of Massachusetts, it became obvious that from its inception the entire proceedings followed the restrictive and unconstitutional Massachusetts doctrine, completely at variance with this Court's conception of constitutional rights.

The defendants had the right to assume that paragraph 6 of the injunction was to be interpreted in accordance with this Court's decisions. The failure of the Massachusetts Court to do so and its rigid adherence to its patently unsound construction of Federal rights invaded the constitutional guarantees which the defendants had a right to rely upon.

The action for contempt and the judge's subsequent charge to the jury were based on the absence of any Federal right of freedom of speech by these employees. If the petitioners could be jailed and fined for such peaceful action, then it is clear that the Federal guarantee is an illusion and a sham, as it has been applied in Massachusetts.

This is the first of these Massachusetts decisions to be brought before this Court. The failure of this Court to grant certiorari would discourage even a courageous individual from attempting to exercise this right within the confines of Massachusetts. Not only would such an individual be subjected to an injunction, but also to potential jail sentences and fines. This Court should hear the case on its merits.

See *Thomas* v. *Collins*, 64 S. Ct. 785.

It has been long established that the constitutional guarantee for freedom of speech, freedom of press, freedom of assembly and freedom of worship means freedom from prior restraint rather than the dubious right of long and expensive litigation, especially where a denial of certiorari in

this case illustrates that such an appeal to judicial process would end in a closed circle in the Massachusetts Courts.

Even if the injunction was appropriate, its construction by the Massachusetts Courts was so distorted and the encroachment on the constitutional rights of the defendants so severe that the doors of this Court should be open.

Wherefore the petitioners pray that this petition for rehearing should be granted.

Respectfully submitted,

SIDNEY S. GRANT,
Attorney for the Petitioners.

SAMUEL E. ANGOFF,
HAROLD B. ROITMAN,
Of Counsel.

UNITED STATES OF AMERICA.

BOSTON, MASSACHUSETTS. OCTOBER 31, 1944.

Now comes Sidney S. Grant, counsel, and certifies that the within petition for rehearing is presented in good faith and not for delay.

SIDNEY S. GRANT.

Sworn to before me this 31st day of October, 1944.

ARTHUR V. GETCHELL,
Notary Public.
My commission expires December 6, 1946.

Index of Cases Cited.

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 281.

SAMUEL SANDBERG ET AL.,

Petitioners,

v.

NEW ENGLAND NOVELTY CO., INC.

BRIEF OF CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

The Civil Liberties Union of Massachusetts files this brief in support of the petition for rehearing on the petition for certiorari because of its opinion that the issues involved are of the utmost importance and concern the public welfare. No statement of the facts is herewith inserted, because the Amicus believes that the same have been substantially set forth in the record and in the petition for certiorari.

By the denial of the petition for certiorari in this case the Court has left the law in Massachusetts in great conflict.

The law relative to peaceful picketing has been clearly adjudicated in this Court.

> *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293.

This Court has never adhered to the view that the mere presence of pickets constituted coercion. By the very terms of the restraining order an attempt was made to limit the order so that there would be no violation or interference with the constitutional rights of free speech and free press.

> The restraining order in part read as follows: "There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and of free press."

Yet the interpretation given by the Supreme Judicial Court clearly amounts to such a violation. The facts were clear. There was no evidence that anyone was disturbed, threatened, or in any way interfered with. The instructions given by the trial court to the effect that the jury could find molestation, intimidation, and threats from the mere presence of peaceful pickets was certainly in error. Apparently it mattered not how near nor how far from non-strikers these pickets were. This interpretation runs directly contrary to the decisions of this Court.

> *Hague* v. *C.I.O.*, 307 U.S. 496.

The right to gather upon the public ways, however not to the inconvenience of the public, is the people's, as the

streets are the proper place for the dissemination of information and opinion.

Lovell v. *Griffin*, 303 U.S. 444.
Carlson v. *California*, 310 U.S. 106.

There was no evidence of public inconvenience. Present is a clear, judicial encroachment of constitutional guaranties.

The fact that this case arises out of the violation of a court order ought not dissuade the court from granting review of the validity of that court order. These defendants were tried for criminal contempt. There cannot be any contempt on an invalid or void order or on the application of an invalid or void order.

In *Thomas* v. *Collins*, Supreme Court, Oct. Term 1944, Docket No. 14, this Court granted review and heard arguments on the merits of an appeal from contempt proceedings where the petitioner did not comply with the restraining order.

In *Lovell* v. *Griffin*, 303 U.S. 444, this Court held that it was not necessary to apply for a license to distribute literature where the requirement of a license was contrary to constitutional guaranties. The issue could be raised without showing that the license had been applied for and had been denied.

Substantial issues have been raised by affirmance of the trial court's ruling. Denial of certiorari means simply that Massachusetts has a law unto itself which cannot be overturned even though contrary to the Federal Constitution and the decisions of the Supreme Court. Denial of certiorari will further encourage the Supreme Judicial Court to continue along the same line that it has in the belief that its decisions are correct.

The right to picket peacefully is so essential, not only for the benefit of labor but also for the benefit of the public, that it needs no further discussion. It is unwise to allow the present conflicting interpretations and applications of the law to stand.

As Amicus Curiae the Civil Liberties Union of Massachusetts urges the Court to grant this petition for rehearing on the petition for certiorari and to grant certiorari.

Respectfully submitted,

CIVIL LIBERTIES UNION
OF MASSACHUSETTS.

ALFRED A. ALBERT,
Of Counsel.